RECORD AND BRIEFS

No. 15-214

IN THE

Supreme Court of the United States

JOSEPH P. MURR, *et al.*,

Petitioners,

v.

STATE OF WISCONSIN AND ST. CROIX COUNTY,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WISCONSIN

BRIEF OF THE CATO INSTITUTE AND OWNERS' COUNSEL OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* AND INTRODUCTION[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato conducts conferences; publishes books, studies, and the annual *Cato Supreme Court Review*; and files *amicus* briefs on a host of legal issues, including property rights.

Owners' Counsel of America ("OCA") is an invitation-only national network of experienced eminent domain and property rights attorneys. They have joined together to advance, preserve, and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights (2d ed. 1998). OCA is a non-profit 501(c)(6) organization sustained solely by its members. Only one member lawyer is admitted from each state. Since its founding, OCA has sought to use its members' combined knowledge and experience as a resource in the defense of private property ownership, and OCA member attorneys have been involved in landmark

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1. The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

property law cases in nearly every jurisdiction nationwide. Additionally, OCA members and their firms have been counsel for a party or *amicus* in many of the property cases this Court has considered in the past forty years.

Amici urge the Court to reverse the Wisconsin Court of Appeals. That court incorrectly permitted the government to effect a taking of Petitioners' property by combining separate but contiguous parcels of land they own to create a new "parcel as a whole" under the regulatory takings analysis of *Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978). Landowners challenging government actions that affect their property already face an uphill climb under *Penn Central*. Adding another layer of uncertainty—asking whether contiguous parcels should be combined—would only complicate that analysis further. The Wisconsin court's holding also creates larger parcels of land, making it easier for the government to effect uncompensated takings. The Court should thus adopt a bright-line rule against combining separate properties to create a "parcel as a whole."

SUMMARY OF THE ARGUMENT

This Court first outlined the test for regulatory takings in *Penn Central*. Although ubiquitous, it is a notoriously difficult test to apply. Its three factors—(1) the "character of the government action," (2) the regulation's economic impact, and (3) the regulation's interference with "reasonable investment-backed expectations"—have perplexed courts and litigants for decades.

The *Penn Central* factors are vague and difficult to apply to concrete property interests. As a result, courts

have considered the factors differently depending on the case, treating one factor as dispositive in one case while ignoring it altogether in others. The factors themselves are also circular. A landowner's "investment-backed expectations" will necessarily depend on existing regulatory regimes, so the "character of the government action" shapes a landowner's expectations.

The Court has attempted to clarify *Penn Central*, *see, e.g.*, *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540 (2005), but these efforts have been inadequate. For example, the Court has acknowledged that notions of "fairness and justice" drive the analysis. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001). This opaque overlay to the *Penn Central* factors only worsens the ambiguity. The Court's failure to clarify the meaning of each factor, or how each should be weighed, has solidified the widely held view that the *Penn Central* test is a muddled area of the law.

This situation is further exacerbated by the fact that landowners rarely prevail in regulatory takings cases. One empirical study found that landowners lose 90 percent of regulatory takings claims. *See* F. Patrick Hubbard *et al.*, *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of* Penn Central Transportation Company?, 14 Duke Envtl. L. & Pol'y F. 121, 141 (2003). In many cases, the impact of such losses can be staggering, with landowners losing almost all of the value of their properties without receiving compensation.

The focus of this case is the "parcel as a whole" inquiry embedded in the *Penn Central* analysis. Whether a regulation amounts to a taking hinges in large part on the "extent of the interference with rights in the *parcel*

as a whole." *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 130-31 (1978) (emphasis added). Thus, before courts can begin to address the intrusiveness of a regulation, they must first define the scope of the affected property. To that end, the size of the property often dictates the severity of the regulation's impact; the smaller the piece of property, the more severe an impact the regulation will likely have. The issue presented in this case is whether courts can combine adjacent parcels to create a new "parcel as a whole" simply because the two parcels have the same owner.

The Court should adopt a bright-line rule against aggregating separate parcels under common ownership. Such a rule would add much-needed clarity to the *Penn Central* test by simplifying the analysis. The lower courts' various tests for when to aggregate parcels are just as complicated as the *Penn Central* test itself. *See, e.g.*, *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013). Attempting to articulate a new test for aggregating parcels, instead of adopting a bright-line rule against it, would only complicate *Penn Central* further.

More importantly, a rule against aggregation would serve to protect landowner rights. Respecting the separation of distinct parcels would ensure that the impact of a regulation is measured against the proper piece of impacted property. As a result, prohibiting aggregation would make it more likely that landowners would receive compensation for onerous regulations. A bright-line rule would also protect landowners' reliance interests on their property lines. This Court has long recognized the benefits of stable property rights. *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 271 (1994). The ability to

rely on expectations in property interests encourages investment, development, and the accrual of wealth. States themselves have protected such reliance interests by adopting various zoning protections, such as the "vested rights doctrine" and "nonconforming uses." A bright-line rule against aggregating separate parcels would do the same.

On the other hand, a rule permitting aggregation of parcels would exacerbate *Penn Central*'s failings. Indeed, simply permitting aggregation *at all* undermines property interests and makes it more likely that landowners will lose regulatory takings claims because the relevant "parcels as a whole" will be larger. This case is an excellent example of that dynamic. After building a cabin on Lot F, the Murrs purchased the adjacent Lot E for investment purposes. But the county blocked them from building on or selling Lot E, dashing any plans the Murrs may have had for the land. Making matters worse, state courts combined the two properties based on their common ownership. That converted a categorical taking of Lot E, for which the Murrs would at least have received compensation, into an uncompensated burden the Murrs must bear.

The losses that the Murrs and other owners of contiguous properties have suffered are particularly troubling because of the arbitrary nature of the government actions. When governments combine separate parcels of property in this manner, they target those who choose to invest in contiguous pieces of property. This haphazard system can only be described as a form of the maligned "reverse spot zoning." Worse yet, the uncertainty created by such aggregation destabilizes landowners' reliance interests. The complicated tests

for aggregation make it more difficult for landowners to predict the impact of future regulations and the outcome of subsequent takings claims. This in turn discourages landowners from purchasing contiguous properties or investing in properties they already own.

Instead of undermining property interests and further muddling the *Penn Central* analysis, the Court should adopt the most natural "parcel as a whole" rule: preexisting, state-drawn property lines should define the relevant parcels. And states should be prohibited from combining contiguous parcels under common ownership when landowners pursue regulatory takings claims.

ARGUMENT

Separate Parcels of Land Should Not Be Aggregated Under *Penn Central* for Takings Analysis Purposes.

A. The *Penn Central* Test Is a "Muddle" That Inadequately Protects Property Rights.

The *Penn Central* test governs almost all regulatory takings cases. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). That test is not a "set formula" but instead relies on "several factors that have particular significance." *Id.* (quoting *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 124 (1978)). "Primary among those factors are '[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.'" *Id.* (citation omitted). Also relevant is the "'character of the governmental action'—for instance whether it amounts to a physical invasion or instead merely affects property

interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'" *Id.* (citation omitted). In short, "*Penn Central* is a balancing test that considers three factors: (1) the character of the state action; (2) the economic impact of the regulation; and (3) the regulation's interference with the owner's investment-backed expectations." Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or a One Strike Rule?*, 22 Fed. Cir. B.J. 677, 677 (2013).

"If there is a consensus today about regulatory takings law, it is that it is highly muddled." John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. Cal. L. Rev. 1003, 1006 (2003). The Court itself has joined that consensus, noting that the *Penn Central* factors have "given rise to vexing subsidiary questions," *see Lingle*, 544 U.S. at 529, and admitting that it has "given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking," *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). The Court has further said that the analysis is "characterized by 'essentially ad hoc, factual inquiries." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002) (citation omitted). Finally, this Court has also acknowledged the subjective nature of the analysis, noting that it relies "as much on the exercise of judgment as on the application of logic." *MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 349 (1986). In short, "[c]ases attempting to decide when a regulation becomes a taking are among the most ... perplexing in current law." *Eastern Enter. v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in judgment and dissenting in part).

Numerous deficiencies in the *Penn Central* analysis lead to this "muddle." At the outset, the language the Court uses to articulate the test is notoriously vague and generally unhelpful to lower courts. Although the Court has repeated the *Penn Central* formula many times, it "has provided little guidance on the meaning and proper application of these three factors." John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. Envtl. L. & Pol'y 171, 171-72 (2005). And the meaning of the factors seems to change from case to case. In that regard, the Court has identified "nine plausible definitions of the term of 'character.'" *Id.* at 186 (labeling the Court's varying definitions of "character" a "veritable mess"). At different times, the Court has applied the "character" of the state action prong to focus on factors such as: the public interests served by the regulation, *see, e.g.*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); whether the regulation benefits the property owner by similarly restricting other property owners (the so-called "average reciprocity of advantage"), *see, e.g.*, *id.* at 491-92; whether the regulation restricts the right to devise the property, *see, e.g.*, *Hodel v. Irving*, 481 U.S. 704, 716 (1987); whether the regulation has retroactive effect, *see, e.g.*, *Apfel*, 524 U.S. at 537 (plurality); and whether the regulation remedies a harm caused by the landowners' own actions, *see, e.g.*, *id.* (explaining that a taking may be less likely when the regulation fixes an injury caused by the landowner).

Moreover, "[t]he regulation's economic effect upon the claimant may be measured in several different ways." *Dist. Intown Props. P'ship v. District of Columbia*, 198 F.3d 874, 879 (D.C. Cir. 1999). For example, the Court has looked at the market value of the property, *Hodel*,

481 U.S. at 714; whether the regulation makes a business "commercially impracticable," *DeBenedictis*, 480 U.S. at 495–96; whether there are other economic uses to which the property can be dedicated, *Andrus v. Allard*, 444 U.S. 51, 66, 100 (1979); and whether the property can earn a reasonable rate of return, *Penn Central*, 438 U.S. at 136. Suffice it to say, the *Penn Central* factors have substantial definitional problems. Echeverria, *supra*, at 178-99 (attempting to reconcile the Court's varying decisions on the *Penn Central* factors).

The Court's failure to clarify the meaning of these factors has "perpetuat[ed] the essentially ad hoc approach to takings analysis and contribut[ed] to the widespread view that regulatory takings is an especially confused field of law." Echeverria, *supra*, at 171-72. The factors have been "affirmed repeatedly as the eye of the needle through which millions of words have been jammed with little agreement among courts about how to analyze the three step test." William Wade, *Sources of Regulatory Takings Economic Confusion Subsequent to* Penn Central, 41 Envtl. L. Rep. News & Analysis 10936, 10936 (2011). Ultimately, the lack of clarity "invites [courts] to engage in open-ended value judgments." J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 Ecology L.Q. 89, 104 (1995).

In addition, the factors are themselves circular. "[E]ach of the principal elements of *Penn Central* depends on the others for content and meaning." Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 Penn St. L. Rev. 601, 604 (2014). A landowner cannot have "reasonable investment-backed expectations" in a jurisdiction that already has plenary regulations

because new regulations are more predictable. "[E]xcept for a regulation of almost unimaginable abruptness, all regulation will build on prior regulation and hence be said to defeat any expectations." *Intown*, 198 F.3d at 887 (Williams, J., concurring). So the "nature of the government action" influences precisely what expectations are "reasonable." *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring) ("[I]f the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is."); *Palazzolo*, 533 U.S. at 634 (O'Connor, J., concurring) ("[T]he nature and extent of permitted development under the regulatory regime vis-a-vis the development sought by the claimant may also shape legitimate expectations.").

Complicating matters further, "[t]he Court ... has never ... explained how th[e] factors should be weighted." Holly Doremus, *Takings and Transitions*, 19 J. Land Use & Envtl. L. 1, 7 (2003). Are courts to weigh each factor equally or is one factor dispositive? The Court's own decisions suggest that "the weight to be afforded conclusions under any separate category must itself depend on the facts of the particular case." Byrne, *supra*, at 104. For example, in *Hodel*, the court found the "character of the governmental action" to be dispositive, 481 U.S. at 716, while in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), the Court found the "investment-backed expectations" factor to be "so overwhelming ... that it disposes of the takings question," *id.* at 1005.

Over time, the Court has attempted to clarify the analysis. *See, e.g.*, *Lingle*, 544 U.S. at 540 (holding after decades of confusion that "due process" considerations have "no proper place in our [regulatory] takings jurisprudence"). But these efforts have ultimately failed. The Court has emphasized that the purpose of the Takings Clause is to promote "fairness and justice." *Palazzolo*, 533 U.S. at 617-18; *Tahoe-Sierra*, 535 U.S. at 333-34, 342; *Lingle*, 544 U.S. at 537. And the *Penn Central* analysis itself should be "informed" by that purpose. *Palazzolo*, 533 U.S. at 617-18; *see also* Mark W. Cordes, *The Fairness Dimension in Takings Jurisprudence*, 20-FALL Kan. J.L. & Pub. Pol'y 1, 3 (2010) (explaining that *Palazzolo*, *Tahoe-Sierra*, and *Lingle* "confirmed that the takings question ultimately concerns 'fairness and justice,' and that courts should apply the *Penn Central* test in this light"). This "fairness and justice" overlay to the *Penn Central* test has made it even more ambiguous, and it has exacerbated rather than clarified the test. *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring) ("The concepts of 'fairness and justice' that underlie the Takings Clause, of course, are less than fully determinate."). What remains is more difficult to apply. *See* Cordes, *supra*, at 4-5 ("[B]oth the *Penn Central* test itself, as well as notions of 'fairness and justice,' are hardly meaningful guideposts to assess whether a restriction constitutes a regulatory taking.").

The arbitrariness of *Penn Central* is particularly problematic because it places a substantial obstacle in the way of landowners who challenge government actions affecting their properties. Indeed, empirical studies show that landowners lose over 90 percent of their takings claims under *Penn Central*. *See* F. Patrick Hubbard et al., *Do Owners Have a Fair Chance of Prevailing Under*

the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company*?*, 14 Duke Envtl. L. & Pol'y F. 121, 141 (2003). This drastic imbalance in litigation outcomes suggests that *Penn Central* is a poor protector of property rights.

A survey of cases confirms as much. Lower court decisions applying *Penn Central* often conclude that no taking has occurred despite extreme diminution in value. *See, e.g.*, *Pace Res., Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1031 (3d Cir. 1987) (finding that an 89.5 percent diminution in value is not a taking); *Nasser v. City of Homewood*, 671 F.2d 432, 435, 438 (11th Cir. 1982) (finding a 52.6 percent diminution not to be a taking); *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377, 1386, 1388-90 (N.J. 1992) (finding a 92 percent diminution not to be a taking); *Walcek v. United States*, 49 Fed. Cl. 248, 271-72 (2001), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002) (finding a 59.7 percent diminution not to be a taking).

The *Penn Central* factors are difficult to understand and to apply, and they obstruct the ability of landowners to obtain just compensation for government regulation of their properties. In other words, "the law is muddled, though the muddle never quite seems to stop the government from winning." Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549, 1644 (2003).

B. A Bright-Line Rule Against Combining Properties to Create a New "Parcel as a Whole" Would Mitigate *Penn Central*'s Failings.

The *Penn Central* analysis hinges in part on the "extent of the interference with rights in the *parcel as a whole*." *Penn Central*, 438 U.S. at 130-31 (emphasis added). Therefore, before courts can begin to navigate the *Penn Central* analysis they first must define the scope of the affected property. *See Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1292 (Fed. Cir. 2013) ("[T]he definition of the relevant parcel of land is a crucial antecedent that determines the extent of the economic impact wrought by the regulation."). The issue in this case, of course, is whether courts can combine adjacent parcels to create a new "parcel as a whole."

The Court should adopt a bright-line rule that preexisting, state-drawn property lines define the "parcel as a whole." And the Court should not permit efforts by governments to combine adjacent properties simply because they share an owner. A bright-line rule would add some clarity to the *Penn Central* analysis because it would be simple to apply in practice. For the most part, "state law defines property interests." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 707 (2010). The most basic of those interests is the metes and bounds of the property. *See id.* at 707-09 (explaining how state law defined the boundaries of privately owned land); *see also Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests ... are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."). Courts can easily rely on those same boundaries when defining the relevant "parcel as a whole."

This method of defining the "parcel as a whole" is the most natural test. *See* Raymond R. Coletta, *The Measuring Stick of Regulatory Takings: A Biological and Cultural Analysis*, 1 U. Pa. J. Const. L. 20, 81 (1998) ("[R]esolution of this issue of parcel definition seems fairly straightforward: identify the relevant parcel as the entirety of the originally purchased tract."). In fact, this Court has already once defined the "parcel as a whole" in this way, noting that the "interest in real property is defined by the metes and bounds that describe its geographic dimensions." *Tahoe-Sierra*, 535 U.S. at 331. Such an approach would plainly be feasible as states and localities already rely on property lines in other contexts. For example, many states provide that separate, contiguous parcels under common ownership should be treated as separate parcels for tax valuation and assessment purposes. *See, e.g., Edward Rose Bldg. Co. v. Indep. Twp.*, 462 N.W.2d 325, 330 & n.4 (Mich. 1990); *Theobald v. Cty. of Lake*, 712 N.W.2d 180, 183 (Minn. 2006). States could easily apply the same standard in regulatory takings claims. Although such a bright-line rule would not solve *Penn Central*'s other infirmities, at least it would not make matters worse.

Perhaps more importantly, a bright-line rule against aggregation will help level the playing field. Under the current legal regime, it is extremely difficult for landowners to prevail in regulatory takings claims. *See, supra*, at 11-12. It would become even more difficult to do so when governments can aggregate separate properties into one. "The determination of what constitutes the 'parcel as a whole' in a given case often is outcome determinative, because regulatory takings law measures the claimant's loss with respect to the relevant parcel." Eagle, *supra*,

at 631; *Intown*, 198 F.3d at 880 ("The definition of the relevant parcel profoundly influences the outcome of the takings analysis."). The size of "[t]he relevant parcel impacts the severity of a regulation's economic impact—the factor that largely determines whether a regulatory taking has occurred." Laura J. Powell, *The Parcel as a Whole: Defining the Relevant Parcel in Temporary Regulatory Takings Cases*, 89 Wash. L. Rev. 151, 159 (2014). "[T]he larger the relevant parcel, the smaller the regulation's economic impact will be on the property" and the "less likely a court will find a taking has occurred." *Intown*, 198 F.3d at 885 (Williams, J., concurring); *see also* Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. Haw. L. Rev. 353, 414 (2003) ("Size matters in a takings case."). Combining two separate parcels into one creates a larger parcel, thus reducing the apparent economic impact of the applicable regulation. As a result, prohibiting aggregation would make it more likely for landowners to receive "just compensation" for the harms caused by oppressive regulations.

Moreover, a bright-line rule would provide legal clarity that would protect property owners' reliance interests and promote land-use development. This Court has recognized the benefit of stable property interests. *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 271 (1994) (explaining that, for property rights, "predictability and stability are of prime importance"); *Republic of Austria v. Altmann*, 541 U.S. 677, 693 (2004) (same).[2]

2. In fact, this Court has placed so much weight on reliance interests in property rights that the consideration affects the Court's *stare decisis* analysis. *See, e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved.").

That position is not controversial because the benefits of preserving reliance interests are straightforward. "[M]en will not labor diligently or invest freely unless they know they can depend on rules which assure them that they will indeed be permitted to enjoy a substantial share of the product as the price of their labor or their risk of savings." Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1212 (1967). Property owners must be given "some assurance that they will have the eventual opportunity to harvest the fruits of their labor." Kenneth A. Stahl, *Reliance in Land Use Law*, 2013 B.Y.U. L. Rev. 949, 959 (2013). Otherwise, "landowners would be hesitant to invest in real property out of fear that their investment could be rendered worthless at the whim[s] of [the government]." *Id.* To that end, "[w]ell-defined and stable property-rights regimes ... reduce legal uncertainty, encouraging more optimal levels of investment [] and development." Troy A. Rule, *Property Rights and Modern Energy*, 20 Geo. Mason L. Rev. 803, 813 (2013). In short, promoting clear rules that better protect property rights encourages investment, development, and, ultimately, the further accrual of wealth. Richard A. Posner, Economic Analysis of Law 40-42 (8th ed. 2011); Carol M. Rose, *The Shadow of the Cathedral*, 106 Yale L.J. 2175, 2187 (1997) ("The usual roles of property rules—defining rights and identifying rights-holders— ... encourage individual investment, planning, and effort because actors have a clearer sense of what they are getting").

"Given the efficiency and fairness benefits of consistent property arrangements, it is hardly surprising that clarity and stability have long been key aims of property law" itself. Rule, *supra*, at 813. States and localities have implemented a number of "doctrines designed to protect landowners who have reasonably relied on an existing scheme of land use regulations against an adverse change in that regulatory change." Stahl, *supra*, at 957; *see also id.* ("[O]ne persistent theme in land use law is the desire to vindicate the expectations of those who have taken substantial actions to their detriment in reasonable reliance on the status quo."). The "vested rights doctrine determines whether a government can enforce a new zoning ordinance against a landowner that began to develop the land under the previous zoning regulation." 4 Am. Law Zoning § 32:2 (5th ed.). Relatedly, "zoning estoppel" protects a property owner who has "made substantial investments in the property[] in good faith reliance on some municipal action or official conduct purporting to authorize the use." *Id.* § 12:9. And "nonconforming use" rules allow a landowner to continue using land in a manner consistent with prior zoning regulations when those regulations are changed. 2 Am. Law Zoning § 14:7 (5th ed.).

"Indeed, it has long been public policy at the national level to induce Americans to incur massive amounts of debt to purchase homes by providing them with the assurance that their investment would be protected." Stahl, *supra*, at 964-65. One of the "principle tools" used to accomplish that predictability in the 20th century was establishing consistent zoning rules. *Id.* at 965. Those rules provided "'greater safety and security in investment' by stabilizing property values against unpredictable change." *Id.*

(quoting Peter Hall, Cities of Tomorrow 317-18 (3d ed. 2002)). A bright-line rule against aggregation would do the same. If potential landowners know that property boundaries are set and will not be shifted later under *Penn Central*, then they will be more likely to invest in and develop property. This is particularly important in cities like New Orleans, which have many vacant lots without viable purchasers other than the owners of adjacent properties. *See* Kelsey Davis, *NORA Relaunches Lot Next Door Program on Monday*, WDSU News (Jan. 25, 2016), http://goo.gl/BWffSh (explaining New Orleans's "lot next door" program, which provides incentives to buy adjacent empty lots). Homeowners will be less likely to purchase vacant lots adjacent to their own property if they are put at a disadvantage relative to others for doing so.

There is some concern that a bright-line standard would empower landowners to dictate their own fate under new regulations. *See Palazzolo*, 533 U.S. at 655 (Breyer, J., dissenting); Coletta, *supra*, at 82. That is, if the "parcel as a whole" is defined by property boundaries, then landowners could simply convey the portion of their property that is affected by a regulation and artificially create a regulatory taking. For example, if a regulation bans any development on a three-acre portion of a nine-acre property, then the landowner could sever and sell the three-acre portion to a third party. That third party could then file a regulatory takings claim against the locality because the three acres are worthless as a result of the regulation.

This hypothetical scenario is easily avoided by adding a temporal limitation to the analysis. The Court could define the "parcel as a whole" as the property boundaries

that existed prior to the relevant regulation's effective date. In such a situation, "if the landowner subsequently subdivides the parcel, the original whole will still provide the denominator of the takings calculation." Coletta, *supra*, at 82. Alternatively, the Court could fashion a narrow exception permitting states to defeat a takings claim by showing that the landowner subdivided the property intentionally to create an artificial taking under *Penn Central*. Under either limitation, the perceived opening for abuse quickly closes without introducing the uncertainty that currently plagues the *Penn Central* analysis itself.

C. Permitting the Combination of Adjacent Parcels Would Exacerbate *Penn Central*'s Problems.

Any rule that permits courts to combine parcels would amplify *Penn Central* shortcomings. Pet. Br. 24-28. First, a survey of the lower courts' fact-driven "parcel as a whole" cases demonstrates that such tests further obscure the *Penn Central* analysis. For example, the Federal Circuit "has taken a 'flexible approach, designed to account for factual nuances,' in determining the relevant parcel where the landowner holds (or has previously held) other property in the vicinity." *Lost Tree*, 707 F.3d at 1293. The "critical issue" in that analysis is "the economic expectations of the claimant with regard to the property," *i.e.*, whether the property owner "treats several legally distinct parcels as a single economic unit." *Id.*

By way of comparison, Michigan applies a different, but no less amorphous, test. There, the size of the parcel as a whole is an inherently "factual inquiry" and involves

consideration of factors like the "degree of contiguity," "the dates of acquisition," and "the extent to which the parcel has been treated as a single unit," but it also allows that "many other[] [factors] enter the calculus." *K & K Const., Inc. v. Dep't of Nat. Res.*, 575 N.W.2d 531, 536 (Mich. 1998). In addition to these considerations, Michigan courts also examine whether it is "realistic" and "fair" to consider only one parcel for purposes of the takings analysis. *Id.*

The Pennsylvania Supreme Court also uses a "flexible approach, designed to account for factual nuances" and considers a "variety of factors" without making one factor "more important than any other." *Machipongo Land & Coal Co. v. Commonwealth*, 799 A.2d 751, 768 (Pa. 2002). "These factors would include, but would not be limited to: unity and contiguity of ownership, the dates of acquisition, the extent to which the proposed parcel has been treated as a single unit, the extent to which the regulated holding benefits the unregulated holdings; the timing of transfers, if any, in light of the developing regulatory environment; the owner's investment backed-expectations; and, the landowner's plans for development." *Id* at 768-69.

The lower courts' tests all differ in one way or another,[3] but they share one aspect in common: each is as complicated as the *Penn Central* analysis itself. *See Dunes West Golf Club, LLC v. Town of Mt. Pleasant*, 737 S.E.2d 601, 617 (S.C. 2013) (referring to the "parcel as a

3. Other courts apply similarly nebulous tests. *See, e.g., Intown*, 198 F.3d at 880; *Am. Savs. & Loan Ass'n v. Cnty. of Marin*, 653 F.2d 364, 369-71 (9th Cir. 1981); *State ex rel. R.T.G., Inc. v. Ohio*, 780 N.E.2d 998, 1009 (Ohio 2002).

whole" analysis as a "Gordian Knot"); Merriam, *supra*, at 415 ("The world of the relevant parcel is indeed a wonderland."). These courts must engage in a complicated two-step. First, they apply a multi-factor test to identify the relevant "parcel as a whole" and, second, they move on to the *Penn Central* analysis itself. In essence, before litigants can even discuss the economic impact within the context of *Penn Central*, they must litigate "these fact-specific inquiries [that] have created confusion and inconsistent results in regulatory takings jurisprudence." Powell, *supra*, at 154. If the Court approves a test like these, it would lead to similar parcels across the country being treated as one piece of property in some instances and separate properties in others, with little rhyme or reason. This would make an already uncertain legal regime even more difficult to navigate.

Those jurisdictions that apply a presumption against aggregation are preferable, although they still fall short. For example, Massachusetts finds that "contiguous commonly-owned property gives rise to a rebuttable presumption defining the relevant parcel." *Giovanella v. Conserv. Comm'n of Ashland*, 857 N.E.2d 451, 458 (Mass. 2006). This presumption does streamline the analysis some. But with every presumption comes factors that may overcome it. In Massachusetts, the "definition of the relevant parcel is a fact sensitive inquiry" even with the presumption because the court still looks to a plethora of additional factors. The presumption can be overcome by factors such as "whether the property is divided by a road," "whether property was acquired at the same time," "whether the purchase and financing of parcels were linked," "the timing of development," "whether the land is put to the same or different uses," "whether the

owner intended to or actually did use the property as one economic unit," and the "treatment of the property under State law." *Id.* at 728-29. Petitioner's proposed presumption likewise leaves open the possibility "for landowners or governments to argue, in the particular case, that the facts and circumstances warrant some degree of segmentation and aggregation." Pet. Br. 25. These rules, while an improvement on others, also make an "already difficult and uncertain rule" more opaque. *Apfel*, 524 U.S. at 542 (Kennedy, J., concurring).

Moreover, simply allowing courts to combine parcels under *any* test makes it less likely that the landowner will prevail on a takings claim. *See, supra*, at 14-15.[4] One need look no further than this case to see the damage aggregation causes, as the Murrs lost a substantial sum because Wisconsin was able to aggregate Lot E with Lot F. Lot E would be worth $410,000 without the regulation prohibiting the Murrs from building on or selling it. JA 113. But those prohibitions reduced Lot E's value to a tenth of that amount. JA 114. Wisconsin managed to avoid compensating the Murrs for that loss because combining Lot E with Lot F mitigated the ban's impact. Instead of decimating almost all value of a piece of property (Lot E), the prohibition merely diminished the value of the aggregated "parcel as a whole" (Lot E + Lot F). Pet. App. C-9. That diminution in value was inadequate to establish a regulatory taking.

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4. For this reason, even those states that permit aggregation with relatively straightforward analyses, such as Wisconsin, *see* Pet. App. at A-11 ¶ 20, exacerbate *Penn Central*'s failings.

Other cases across the country show that landowners suffer big losses when their properties are aggregated. For example, in *Forest Properties, Inc. v. United States*, the Federal Circuit's parcel-aggregation led to staggering uncompensated losses. 39 Fed. Cl. 56 (1997). There, the landowner obtained 9.4 acres of "lake bottom" land. *Id.* at 72. The Army Corp of Engineers later prohibited the landowner from developing that land, *id.* at 64-66, and in response the landowner asserted that the prohibition amounted to a regulatory taking and a $2.36 million loss. *Id.* at 67, 79. The court disagreed, holding that the "parcel as a whole" was not just the affected 9.4 acres but also 53 adjacent acres under common ownership. *Id.* at 73. Though the court agreed that the prohibition caused a multi-million-dollar loss, the prohibition did not amount to a taking because there was still substantial value in the remaining 53 acres. *Id.* at 80. In other words, aggregating the 9.4 acres with an additional 53 acres permitted the government to effect an astounding categorical taking simply because the adjacent land shared an owner.

These losses are particularly troubling because they can be described only as arbitrary. When courts use common ownership as a basis for defining separate parcels as one, they burden those who invest in contiguous properties and not those who buy nonadjacent property. Keith Woffinden, *The Parcel as a Whole: A Presumptive Structural Approach for Determining When the Government Has Gone Too Far*, 2008 B.Y.U. L. Rev. 623, 640 (2008) ("The contiguous, commonly-owned property approach is also subject to criticism because it can produce arbitrary and unfair results."). This makes *Penn Central*'s ad hoc analysis all the more capricious.

To that end, combining adjacent parcels because of shared ownership resembles "reverse spot zoning," which the Court criticized in *Penn Central* itself. Reverse spot zoning "severely restricts a small parcel of land that is surrounded by lands not similarly restricted." 1 E. Ziegler, Rathkopf's The Law of Zoning and Planning § 11:20 (4th ed. 2001). Wisconsin accomplished that same feat by combining Lot E and Lot F. While the Murrs face a categorical restriction, there are no analogous restrictions on similar lots nearby. This "arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones," *Penn Central*, 438 U.S. at 132, which is "discriminatory zoning" that is "the antithesis of land-use control." *Id.*

Further, the various tests for combining parcels destabilize property owners' reliance interests. As already explained, "the industrious and rational need to know that the consequences of their dealings are fixed, at least legally; no shifts of responsibility after the fact." Carol M. Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577, 592 (1988). That "means that the legal consequences of rules ought to be clear in advance, in other words, crystals rather than mud." *Id.* Allowing aggregation on an essentially ad hoc basis, *see, supra*, at 19-21, creates instability in property rights and undermines individuals' reliance on the property lines they purchased. "If takings jurisprudence is both ad hoc and ex post, [then] investors may have a very difficult time knowing whether a ... state action will or will not be judged to be a taking." Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 Colum. L. Rev. 1697, 1700 (1988). At best, aggregation discourages individuals from purchasing and developing lands in close proximity to their own land. A

bright-line rule against aggregation, however, avoids this problem by protecting owners' reliance interests on pre-existing property lines. *Id.* ("Takings law should be predictable ... so that private individuals confidently can commit resources to capital projects.").

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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